



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 9 OF 2015

(FORMERLY COMMERCIAL AND ADMIRALTY SUIT NO. 362 OF 2014)

HASS PETROLEUM LIMITED.....PLAINTIFF

VERSUS

A.O. BASID LIMITED.....DEFENDANT

RULING

1. The Plaintiff filed this suit on 20th August, 2014 against the Defendant claiming KShs. 17,090,973.27/= for petroleum products alleged to have been supplied to the Defendant but for which the Defendant is alleged to have failed to pay. The Plaintiff filed a request for judgment dated 10th December, 2014 on 15th December, 2014 pursuant to which judgment was entered against the Defendant on 16th December, 2014.
2. Pursuant thereto, the Defendant filed a Notice of Motion dated 12th January, 2015 seeking the following orders:-
 - i. *That this court be pleased to set aside the decree/judgment of 13th October, 2014 and any consequential orders thereof.*
 - ii. *That interim orders of stay of execution of the warrants of attachment issued by Zasha Auctioneers on 6th January, 2015 pending the hearing and determination of this suit.*
 - iii. *That an order do issue that the matter be heard de novo upon filing the draft defence annexed herein.*
 - iv. *That an order do issue that the process server who purported to have served the summons appear in court for purposes of cross-examination.*
3. The application is premised on the grounds on the face of the application and the Supporting Affidavit of Charles Muchiri who is the General Manager of the Defendant. It was contended that the Defendant was never served with summons and that the affidavit of service on record giving rise to the interlocutory judgment is full of falsehood as service was not effected as alleged and the process server ought to appear in court for cross-examination. That the auctioneer had undervalued the Defendant's motor vehicle trailers which the Defendant is apprehensive that if the auctioneers are not stopped, will be attached and sold occasioning the Defendant prejudice as the said items are tools of trade. The Plaintiff denied that it is indebted to the Plaintiff and that the amount demanded is colossal and that it is only fair and just that this suit be heard on merit.

4. In response to the application, Mr. Abdi Samatar, the Legal Manager of the Plaintiff swore a Replying Affidavit on 26th January, 2015. He swore that the Defendant's application is an attempt to further delay its obligation to pay the Plaintiff; that the Defendant wrote to the Plaintiff on 10th September, 2013 acknowledging that it owed the Plaintiff the debt of KShs. 17,090.973/27 and proposed to settle the debt in six instalments. That in pursuance thereof, the Defendant issued the Plaintiff with five (5) cheques in part payment of the debt which cheques were dishonoured upon presentation on their due dates thereby occasioning the Plaintiff to suffer bank charges on each unpaid cheque. That on 4th September, 2014 the Defendant was left with summons to enter appearance and its duly authorised officer Mr. Abdirizak Seleman Tuke accepted service. It was stated that the Defendant notified the Plaintiff of its intention to settle the debt by 15th September, 2014 but failed to offset the said debt.
5. It was therefore contended that the Defendant's application is an afterthought and a means to defeat justice and is an abuse of court process. That the Defendant no longer has a permanent address of service and is likely to wind up business leaving the Plaintiff with huge losses that cannot be made good. That the value of the Defendant's assets have depreciated in value and are worth less what is owed to the Plaintiff. That this suit was properly heard on merit and the Plaintiff will suffer prejudice if it is heard de novo as the Defendant is in the process of disposing of its property and winding up its business and that the debt has been outstanding for four (4) years now. That the Plaintiff has already incurred costs in tracing in and investigating the whereabouts of the Defendant and that the Defendant ought to be compelled to swear under oath their current permanent address and place of business. That the Defendant be restrained from disposing of any assets and be compelled to state the size of the fleet of their motor vehicles as they claim they are its main tools of trade.
6. Mr. Charles Muchiri swore a Further Supporting Affidavit on 29th January, 2015 wherein he contested that the Defendant has no manager or employee by the name Abdirizak Seleman Tuke; that the Defendant has no offices at Industrial area along Kenya Pipeline rather the offices are located at Lunga Lunga Road opposite Patiko. It was stated that it was true the auctioneers served the Defendant with the proclamation at its office in Lunga Lunga Road and was issued with an order for stay of execution but denied knowledge of intention to dispose of its assets as alleged. It was further stated that the Defendant was neither served with summons nor notice of entry of judgment and that therefore the judgment was irregular.
7. The application was canvassed by way of written submissions which were ably hi-lighted by learned Counsel. It was the Defendant's submissions that it was not properly served in accordance with the provisions of Order 5 Rule 2 as Abdirizak Seleman Tuke is a stranger to the Defendant. It was further submitted that in view of the improper service, the judgment entered herein is irregular and ought to be set aside.
8. On the other hand, the Plaintiff submitted that the Defendant had failed to meet the requirements for granting stay orders set out under Order 42 Rule 6 of the Civil Procedure Rules. The Plaintiff submitted that the Defendant's admission of the debt disentitles it to the orders sought. In this regard the Plaintiff cited **Sameer Africa Limited v. Aggarwal & Sons Limited (2013) eKLR** where the court declined to set aside default judgment on account that there was a clear admission of liability. It was submitted that the court had given interim orders of stay pending the hearing of the present application. That the said orders were made after this court had become functus officio and that it is trite law that substantive orders cannot be made once the court has become functus officio. It was further submitted that there is no appeal on record.
9. I have considered the Affidavits on record, the written submissions and the oral hi-lights thereon. I have also considered the authorities relied on together with the testimony of the auctioneer upon cross examination. What falls for this court's determination is whether the Defendant has satisfied the conditions for setting aside the judgment entered in default of appearance. An issue was raised by the Plaintiff that this court was functus officio the moment judgment was entered and signed and that it ought not to have issued the orders of stay. In the **Eric Kimani case (supra)** that was relied on by the Plaintiff, the court was dealing with an omission on the computation and issue of orders for a decretal amount which is not the case here. A court will be considered functus officio in an attempt by it to re-adjudicate substantive issues which it has made a finding on. That is not the case here and the argument in my view is spurious.
10. Order 10 Rule 11 of Civil Procedure Rules provides:-

“11. Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

11. In the case of **Philip Keipto Chemwolo and Mumias Sugar Co. Ltd v. Augustine Kubende (1982-1988)1 KAR 1036** Court of Appeal considered the principles applicable in an application such as the one under consideration and stated that:-

"1. The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties (Kimani v McConnell (1966) EA 547).

2. Where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied there was a triable issue.

3. In this case there was a triable issue on contributory negligence which would affect the quantum of damages. (Emphasis own)

12. In the same judgment APALOO J. A, (as he then) was on page 104 on line 18 stated:-

“Blunders will continue to be made from time to time and it does not follow that because a mistake had been made that a party should suffer the penalty of not having his case determined on its merits.”

I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. (Emphasis own)

13. In the case of **Shah v. Mbogo & Ano (1967) E.A 470** Court of Appeal for Eastern African held:-

"IV. Applying the principle that the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused." (Emphasis own)

14. It follows therefore that this court has discretion to set aside a judgment entered in default of appearance but such discretion must be exercised judiciously. The issue under contention is that of service of the summons and the Plaintiff.

15. By a ruling of this court delivered on 5th June, 2015, this court directed that the process server Willis Agayi who swore the affidavit of service of 13th October, 2014 that was the basis of the judgment in default appear in court for cross-examination. The Process Server duly appeared and was cross examined on his said Affidavit. He stated that on the date of service he was accompanied by one Mr. Abdi Samatar from the Plaintiff. He admitted that he had not explained in his Affidavit of service how he knew Abdirizak Seleman Tuke but explained that he had done so in a lower court matter in the year 2014. He further explained that it was Mr. Samatar of the Plaintiff who had informed him that Mr. Tuke was one of the Directors of the Defendant. He stated that Mr. Tuke confirmed that he had authority to receive summons as one of the Directors of the Defendant before effecting service of the Summons and the Plaintiff in this matter upon him. He confirmed that the name of Abdirizak Seleman Tuke does not appear in the memorandum and articles of association produced by the Defendant as (Annexure 'CM3') as one of the directors. He told the court that the affidavit of service he was being cross examined on was in respect of CMCC No. 5254 of 2014 and the parties therein were different from the ones in this suit. He

stated that based on that Affidavit of Service, he did not serve summons in respect to this suit rather he did to CMCC No. 5254 of 2014. On re-examination, he clarified that he had served the Defendant in HCCC No. 362 of 2014 and that there may have been an error in the title to the affidavit he was being shown.

16. Although the Defendant dispute that their offices are not situated in Industrial area, their own document, the memorandum of association reveal that the offices are situate at the junction of Lunga Lunga and Rangwe Road, Industrial area in Nairobi. I saw the process server testify in court on his Affidavit of Service. Although he was confused because he was being shown and cross examined on an Affidavit of Service that did not relate to this suit, he was nevertheless firm as to having served the Defendant. This court tried to bring to the attention of Counsel for the Defendant that the Affidavit of Service that led to the impugned judgment was dated 13/10/14 but filed on 15/12/14 but Counsel insisted on cross examining the auctioneer on the Affidavit of service dated 26/11/14. The Affidavit of Service of 13/10/14 clearly sets out how the Defendant was served.
17. The Defendant attempted to rely on the Memorandum and Articles of Association and a document from the Registrar of Companies (CR12) dated 1st July, 2015 to show that there was no director by the name of Abdirizak Seleman in the Defendant's Board. However, the said documents cannot be conclusive evidence that there is no such director belonging to the Defendant. This is because the Memorandum and Articles produced by the Defendants show that they were executed and filed with the registry of companies in 2003. The search from the Registrar of Companies related to the records of the Company/Defendant as at 31/01/11. What the Defendant should have done was to produce the company records as at 13th October, 2014 when it is alleged that a Mr. Selemani Tuke was served as a director of the Defendant. This the Defendant did not do. The process server swore positively as to the information he got at the Defendants premises/offices. Indeed, he pointed out that the company records may have changed between the time those documents were filed and when he was effecting service. The burden of proving otherwise in my view, shifted to the Defendant who unfortunately did not dislodge it.
18. The other thing is the admission of the debt alluded to by the Plaintiff. The Plaintiff produced cheques which were issued by the Defendant allegedly in repayment of the debt which however were not paid on presentation. This piece of evidence was not denied despite the Defendant filing a Further Affidavit. With such evidence, of what value will the setting aside of the judgment and allowing the Defendant to file a defence be? That to my mind will be but to only postpone the day of reckoning for the Defendant. It will serve no purpose. The draft defence contains but mere denials which cannot stand in the face of the bounced cheques produced by the Plaintiff.
19. Accordingly, I find that the Defendant's application is only meant to defeat the ends of justice and is hereby denied with costs.

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A. MABEYA

JUDGE

Dated, Signed and Delivered at Nairobi this 17th day of September, 2015.

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JUDGE